J HENG CONSULTING SERVICES (M) SDN BHD & ANOR *a*

v.

THE NEW STRAITS TIMES PRESS (M) BHD

HIGH COURT MALAYA, PENANG *b*
RK NATHAN J
[CIVIL SUIT NO: 22-435-2001]
23 APRIL 2003

TORT: *Damages - Libel - Defendant a local daily - Whether owed a duty to ensure accuracy in reporting - Article published libellous in nature - Damages awarded - Whether reasonable - Whether to be awarded interest on damages awarded - Whether costs for entire suit be included* *c*

The defendant published a report in its daily denoting that one Tan Phaik Tin, who claimed trial to four counts of forgery, was "… from J Heng Consulting Service (M) Sdn Bhd … ." The plaintiffs denied that the said Tan was connected to them in any material way and that the said news had tarnished their reputation. When their demand for an apology was ignored, they commenced a libel action against the defendant, contending that they suffered humiliation and felt defamed. The parties eventually came to an agreement whereby, inter alia, the defendant admitted to the libellous nature of the said article; that the second plaintiff withdraw from the suit; and that the damages were to be assessed by the court. The senior assistant registrar proceeded to award the plaintiff damages amounting to RM200,000; that there be no award for aggravated or exemplary damages; and on costs to be agreed upon or to be taxed. *d* *e* *f*

Dissatisfied with the said decision, the defendant appealed *vide* encl. 26 against the damages awarded. The first plaintiff, *vide* encl 25, also appealed against the SAR's refusal to award exemplary and aggravated damages; interests on the damages awarded; and costs for the entire suit. *g*

Both appeals were heard together.

Held:

[1] A distinction must be drawn between the right to freedom of speech and the freedom of press. Whilst the courts endeavour to see that the right to freedom of speech is protected, the press has no special privileges. It must conform and be liable for its publication just like any ordinary citizen if it transgresses the law relating to libel. (p 646 d) *h*

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[2] Every newspaper has an obligation, not only to its readers but also to the person, subject to its comments. Reputation once tarnished will lose its lustre. In the present case, the defendant was reckless in its publication and was not concerned whether such an allegation was true or false. Its action tantamount to a malicious attack which was intended to defame the first plaintiff. The defendant's refusal to apologise was also noted as it would have otherwise been an important mitigating factor. (pp 646 f, h & 647 b)

[3] The plaintiff's claim for exemplary and aggravated damages was denied as a reasonable award had been made under general damages. However, the first plaintiff would be awarded interests on the damages awarded as it would be unfair to deprive it of interest for the period in which it had been deprived of its money. Additionally, the plaintiff would be awarded costs for the full trial inclusive of the costs of the assessment of damages. (p 647 e & g-h)

[Defendant's appeal as per encl. 26 dismissed with costs; plaintiff's appeal vide encl 25 allowed in part with costs.]

Case(s) referred to:

Arnold v. King Emperor [1914] 83 LJ PC 299 ***(refd)***
Karpal Singh Ram Singh v. DP Vijandran [2003] 2 CLJ 77 FC ***(refd)***
Langlands v. Leng [1916] SC (HL) 102 ***(refd)***
Noor Asiah Mahmood v. Randhir Singh [2000] 5 CLJ 407 HC ***(refd)***
Normala Samsudin v. Keluarga Communications Sdn Bhd [1999] 3 CLJ 167 HC ***(refd)***

For the plaintiffs - John Khoo; M/s Ismail, Khoo & Assoc
For the defendant - Harminder Kaur Gill; M/s Shearn Delamore & Co

Reported by M Maheswaran

JUDGMENT

RK Nathan J:

Facts

The 1st plaintiff was and is engaged in providing professional secretarial services and advice to clients and has been so engaged for twenty years and had acquired a good reputation and is believed to have a good clientele from the Chinese business community. The 2nd plaintiff an accountant and a chartered secretary was at all material times the managing director and the alter ego of the 1st plaintiff. The defendant is the foremost leading English daily in Malaysia with a very wide circulation.

On 17 July 2001 the defendant published in a daily the following news:

Director charged with four counts of forgery

> A company director claimed trial at the Sessions Court today to four counts of forgery by using false resolutions three years' ago. Tan Phaik Tin, 41, from J. Heng Consulting Services (M) Sdn Bhd, was charged with fraudulently using a false Directors' Circular Resolution Driall (Malaysia) Sdn Bhd dated Nov 5, 1998, as an original' document while knowing it to be forged between Nov 5, 1998 and Nov 13, 1998. For the second and third charge, she was alleged to have committed a similar offence between June 1, 1998 and June 2, 1998 and between June 3, 1998 and July 31, 1998. For the fourth charge, Tan was alleged to have fraudulently used a false Members Circular Resolution as an original document, while knowing it to be forged, between June 3, 1998 and July 31, 1998. Tan was alleged to have committed all four offences at the company's premises at Jalan Cantonment here. She was charged under Section 471/468 of the Penal Code, punishable with maximum imprisonment of seven years and a fine.

It was the case of the plaintiffs that at no time did they ever engage the services of, nor did they employ, the said Tan Phaik Tin (Tan). By an order to amend dated 4 February 2002 the plaintiffs also averred that the said Tan was never the director at any time nor did she hold any position, in the 1st plaintiff.

By publishing the said news, the plaintiffs contended that the defendant through its reporter and editorial staff, had meant that:

(a) The plaintiffs or their staff had been engaged in criminal activities;

(b) The plaintiffs could not be believed and that they have indulged in forgery, fraud or cheating;

(c) The plaintiffs were not professionals and were not providing proper services to the general public;

(d) One of the plaintiffs' employees has been charged by the Public Prosecutor and that it is believed that the plaintiffs would be responsible;

(e) The plaintiffs were dishonest, untrustworthy were clever at manipulating, were unscrupulous, imprudent, shrewd and cunning and had conspired to cheat and had abetted in illegal activities;

(f) The plaintiffs could not be relied on to do an honest job as they were involved in a scandal;

(g) The plaintiffs were not suited to be involved in such a service industry;

(h) The plaintiffs ought to be shunned by the general public as being criminals, cheats and thus lacking in credibility;

(i) The plaintiffs have no integrity or morals to be able to perform secretarial services and to render advice.

The plaintiffs further pleaded that as soon as the said publication had appeared in the defendant's newspapers the plaintiffs received numerous calls from their clients enquiring as to the implications arising out of the publication. The plaintiffs contended that they suffered humiliation and felt defamed.

The plaintiffs forthwith demanded an apology through their solicitor's letter dated 20 July 2001 and sought damages but the defendant failed to respond. Contending that the defendant had falsely and maliciously published the article, the plaintiffs thus sued for libel and prayed for:

(i) General damages amounting to RM2 million or such sum as the court finds just and reasonable;

(ii) damages;

(iii) an injunction to restrain the defendant and its servants or agent, from circulating the said or such similar article or in any other way from defaming the plaintiffs;

(iv) exemplary damages;

(v) aggravated damages;

(vi) costs;

(vii) such other or further relief that the court finds suitable.

The defendant entered appearance and filed an elaborate defence. Other than admitting the said publication the defendant denied any of the allegations, implications and innuendoes relied on by the plaintiffs. The defendant further contended that subject to the defendant seeking discovery of documents and interrogatories from the plaintiffs, it intended to justify its publication by pleading particulars relating to corruption. The defendant contended that:

(a) Corruption is a serious set-back towards the rise of the Malaysian economy and its position when compared to other nations of the world;

(b) Corrupt practices by a director, employee of a firm or an accounting firm, weakens the public's trust towards such a professional body;

(c) It is important that the public be kept informed regarding directors, employees of firms and accounting firms who are being investigated, charged, brought to court or those who are suspected of being involved in corrupt practices;

(d) It is obligatory on its part to keep the general public informed regarding directors, employees of firms and accounting firms who are being investigated, charged brought to court, or those who are suspected of being involved in corrupt practices.

Another important pleading of the defendant was that it had taken reasonable and careful steps to ensure the correctness of the facts before publication. The defendant pleaded that its reporter had spoken to one Harpal Singh the accused Tan's counsel in court on the hearing date and that the said Harpal Singh had indeed confirmed that Tan was a director of the 1st plaintiff.

The defendant further pleaded that if that was not true, certainly it would not have published the said article. The defendant pleaded that it intended to take out third party proceedings against the legal firm of Harpal & Co. The defendant admitted that it had received the plaintiffs' solicitor's notice of demand but pleaded that it neither tendered an apology or agreed to pay damages. The defendant denied any liability.

The defendant promptly filed an *ex parte* summons (encl. 10) for leave to issue third party proceeding against Harpal Singh, which application was set for hearing on 11 March 2002. The plaintiffs' application to amend the statement of claim was resisted by the defendant. However the learned deputy registrar granted the order to amend on 4 February 2002. Dissatisfied with that decision, the defendant appealed (encl. 12). In the meantime the plaintiffs took out an application (encl. 7) to strike out the defence and to fix a date for assessment of damages and also asked for costs. Enclosure 7 & 10 were fixed for hearing on 19 June 2002.

The defendant then filed a notice of change of solicitors. On 19 June 2002 the defendant's new solicitors and the plaintiffs' solicitors appeared before me and recorded consent judgment in respect of encl. 7 as follows:

1) The plaintiff to withdraw encl. 7;

2) The defendant admits that the publication of the said article constituted a libel against the 1st plaintiff;

3) The 2nd plaintiff withdraws from the suit with no order as to costs;

4) Damages to be assessed by the court with costs to follow the event.

The learned senior assistant registrar (SAR) then proceeded to assess damages and on 22 January 2003 she made an order as follows:

Damages RM200,000.00

No aggravated or exemplary damages

Costs to be agreed upon or to be taxed.

Both parties were dissatisfied with that decision. The 1st plaintiff appealed (encl. 25) against the learned SAR's refusal to award:

(i) Exemplary and aggravated damages;

(ii) interests on the damages awarded; and

(iii) costs for the entire suit and not just costs for the assessment of damages only.

The defendant appealed (encl. 26) against the award of RM200,000.

Findings Of The Court

I heard both the appeals on 19 March 2003 and by consent I heard encl. 26 first.

Enclosure 26

In a short submission counsel for the daily urged the court to award a sum of RM30,000 which she had submitted as fair damages before the learned SAR. She argued that the defamatory sting arose out of the use of the word "from" in the publication since the inclusion of the word "from" gave the impression that Tan was a director of the 1st plaintiff when read together with the title.

Mr. John Khoo for the 1st plaintiff informed the court that the defendant only entered into the consent order after the plaintiffs had filed encl. 7 to strike out the defence. Whilst pointing out that the 1st plaintiff was not appealing against the award of RM200,000 he urged the court not to disturb the said sum. Although not found anywhere in the pleadings, parties by consent agreed that Tan was found guilty of all four counts and that she has since appealed against conviction and sentence.

There are numerous reasons why I felt compelled not to disturb the award of the learned SAR. Although there is no compulsion for the learned SAR to give her reasons she must have been guided by set principles in exercising her discretion in making the said award.

The 1st plaintiff in its statement of claim had stated what it was engaged in and that it was mainly rendering, secretarial services and advice to Chinese businessman. The defendant runs a daily which has an extensive circulation.

Whilst I agree that if not for the word "from J. Heng Consulting Services (M) Sdn Bhd" in reference to Tan, there would have been no cause of action against the defendant, words once spoken or written must be construed in the context the man in the street would receive its meaning. Here, the use of the preposition "from" clearly indicates that the guilty person Tan was a director of the 1st plaintiff.

Whilst the 1st plaintiff's case was that the said Tan had no dealings with it, either as an employee or as a director, even when the notice of demand was sent out at the behest of the 1st plaintiff to the defendant through the 1st plaintiff's solicitors, neither the defendant nor its solicitors made a search at the Registry of Companies (ROC) to ascertain if the said Tan was a director of the 1st plaintiff. A search at the ROC would most certainly have shown that the 1st plaintiff had indeed been wronged; and at that very stage when the demand notice was received the defendant could have as requested in the demand letter, admitted liability and mitigated damages.

Instead of this the defendant took a stand and which if it was right, it most certainly was entitled to do. The defendant pleaded in its defence that one Harpal Singh an advocate and solicitor who defended the said Tan had told the defendant's reporter that the said Tan was a director of the 1st plaintiff. As I said earlier if that was true then there was a valid defence. However since after the said notice of demand, the plaintiffs pursued with the cause of action by filing this suit, surely the defendant ought to have, as an act of prudence, at that stage made a search at the ROC.

The defendant filed an elaborate defence and pleaded that it intended to seek discovery of documents and interrogatories. The defendant further sought to justify its publication by pleading that it owed a duty to the public to keep the pubic informed of investigations, or charges being preferred against directors, employees of firms and employees of professional bodies since corrupt practices by such persons would have a detrimental effect on the country's economy.

Whilst I agree that the slippery tentacles of corruption have laid their grip on the affairs of man, yet the conduct of the defendant in trying to seek protection by exposing corruption, and by alleging that the accused Tan was from the 1st plaintiff, meant that the said Tan a director of the 1st plaintiff was corrupt and ought to be exposed and in so doing, the affairs of the 1st plaintiff ought also to come under public scrutiny. Indeed the defendant maintained that it was obligatory on its part to keep the public informed. As I said, whilst the

defendant has a duty to report on court proceedings, it must only report what is actually said in court. In *Langlands v. Leng* [1916] SC (HL) 102 Lord Shaw said at p. 110 as follows:

> A newspaper has the right, and no greater or higher right to make comment upon a public officer or person occupying a public situation than an ordinary citizen would have.

In *Arnold v. King Emperor* [1914] 83 LJ PC 299 Lord Shaw again said at p. 300 as follows:

> To whatever lengths the subject in general may go, so also may the journalist, but apart from statute law, his privilege is no other and no higher ... the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of every other subject. No privilege attaches to his position.

A distinction must be drawn between the right to 'freedom of speech' and the 'freedom of the press'. Whilst the courts would endeavour to see that the right to freedom of speech is protected, there is no special privilege according to the press. It must conform and be liable for its publication just like any ordinary citizen if it transgresses the law relating to libel.

I say this because the defendant was so convinced of the correctness of its conduct that it even admitted in the defence that if not for the fact that Harpal Singh had told its reporter that Tan was a director of the 1st plaintiff, it would not have published such a statement. On this account the defendant took out third party proceedings against Harpal Singh. I would have thought that even at this stage the defendant could have written to Harpal Singh for confirmation as to whether he did indeed make such a statement and that if he denied the same, to admit liability and to mitigate damages. The adamant stand of the defendant in proceeding with its ill-advised course of defence must lead this court to conclude that the defendant was reckless in its publication and was not concerned whether such an allegation was true or false. Having filed the third party proceedings the defendant made no further progress towards justifying such a course of action. On the contrary it made an about turn and conceded liability. This to my mind clearly meant that the defendant paid no heed to its publication and recklessly and maliciously defamed the 1st plaintiff.

Every newspaper has an obligation not only to its readers but also to the person, the subject of its comments. Reputation once tarnished will lose its lustre. If one steps into a muddy pond even with the intent of picking a sweet-smelling water-lily, the smell of the mud will linger for a long time however much one scrubs the mud off one's feet. Reputation is just like that. That is why accurate

and unbiased reporting is a pre-requisite for a national newspaper. It is no use berating overseas reporting and news-disseminators of unfair and incorrect reporting. The newspapers in this country must set an example.

Another factor this court had to consider is the refusal of the defendant to apologise. That would have been an important mitigating factor. Having considered all these factors I had no hesitation in dismissing the defendant's appeal with costs.

Enclosure 25

Although the plaintiff has not appealed against my decision, however for completeness I hereby give my reasons in respect of the plaintiff's appeal.

(i) The first complaint of the plaintiff was that there was no award for exemplary and aggravated damages. In *Normala Satiisudin v. Keluarga Communications Sdn Bhd* [1999] 3 CLJ 167 I awarded aggravated damages because the defendant had further aggravated the defamation by repeating the libel in publications subsequent to the improper publication, despite a complaint by the plaintiff. Whilst in *Noor Asiah bte Mahmood v. Randhir Singh* [2000] 5 CLJ 407 I had made an award for aggravated damages in almost a similar situation where no offer of an apology had been made, and considering the reckless manner in which the articles were written, yet I had declined to make an award under this head in this case because of the present trend to minimise the awards. I found that the plaintiff has already been given a sufficiently reasonable award under general damages.

(ii) I allowed the 1st plaintiff's appeal under this head since the learned SAR made no award for interest on the general damages. In the latest decision of the Federal Court, namely in *Karpal Singh Ram Singh v. DP Vijandran* [2003] 2 CLJ 77 the Federal Court held that it is unfair to deprive the plaintiff of interest for the period in which the plaintiff has been deprived of its money, as interest ought to be awarded to the extent that is fair and proper. I was the trial judge in that case and the Federal Court had held that the award of 4% interest on the damages awarded from the date of publication to the date of judgment was reasonable. I therefore made the same award of interest at 4% to run from the date of publication of the article to the date of assessment.

(iii) On this score where the learned SAR only awarded the 1st plaintiff costs of the assessment and not the full costs of the trial, learned counsel for the daily very honourably left the matter to the court.

I therefore allowed the appeal on this and granted the 1st plaintiff costs for the full trial inclusive of the costs of the assessment of damages. I also allowed the 1st plaintiff's costs of this appeal.